LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 1 1965
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1965

No. 637

JAHNCKE SERVICE, INC.
and
THE HOME INSURANCE COMPANY,
Petitioners,

versus

THE GREATER NEW ORLEANS
EXPRESSWAY COMMISSION
and
WINN-DIXIE LOUISIANA, INC.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

GEORGE B. MATTHEWS
CHARLES E. LUGENBUHL
N. B. BARKLEY, JR.
WILLIAM McM. KING
Attorneys for Respondent,
The Greater New Orleans
Expressway Commission

LEMLE & KELLEHER
LANCASTER & KING
Of Counsel

TABLE OF AUTHORITIES

CASES:

Cushing vs. Maryland Casualty Co. (5 Cir., 1952) 198 F.2d 536 ____ 2

Lovless vs. Employers Liability Assurance Corporation (5 Cir., 1955) 218 F.2d 714 ____ 3

Maryland Casualty Co. vs. Cushing, 347 U.S. 409(1954) ____ 1

Reid vs. Crain Brothers (La. App., 1961) 134 So.2d 917 ____ 3

Tokio Marine & Fire Ins. Co. vs. Aetna Cas. & Surety Co. (5 Cir., 1963) 322 F.2d 113 ____ 3

Walker vs. Harris (5 Cir., 1964) 335 F. 2d 185, cert. den. 379 U.S. 930 ____ 3

OTHER AUTHORITIES:

Louisiana Revised Statutes, Title 22, §655 ____ 2

Supreme Court of the United States

OCTOBER TERM, 1965

No._____

JAHNCKE SERVICE, INC.
and
THE HOME INSURANCE COMPANY,
Petitioners,

versus

THE GREATER NEW ORLEANS
EXPRESSWAY COMMISSION
and
WINN-DIXIE LOUISIANA, INC.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Under the guise of "questions . . . of national importance" and alleged inter-circuit conflict, petitioners here seek to have this Court reconsider its holding in *Maryland Casualty Co. vs. Cushing*, 347 U.S. 409 (1954), when, because of the District Court's denial of limitation, the questions and issues of *Cushing* are not present; and to overturn the amply supported fact findings of the District Court in violation of the McAllister Rule.[1]

---

[1] "In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly erroneous. No greater scope of review is exercised by the appellate tribunals in admiralty cases than they exercise under Rule 52 (a) of the Federal Rules of Civil Procedure, 28 U.S.C.A." *McAllister vs. United States* (1954) 348 U.S. 19.

The simple answer to the first questions presented by petitioners lies in the fact that the District Court here, after a full trial on the merits, *denied* petitioner, Jahncke Service, Inc., the right to limit its liability under the Federal Act. At this juncture, and without the benefit of limitation, Jahncke Service, Inc. and its underwriter stood in the same position as any ordinary respondent in a simple action in maritime tort. Accordingly, it cannot seriously be argued that the District Court's action in permitting a direct action against Jahncke's underwriter was "violative of the Federal Limitation of Liability Act." Neither the Act nor *Cushing* and its issues were before the Court and, insofar as this Court is concerned, such issues " . . . ought not to be anticipated in the theoretical abstract."[2]

Petitioners suggest to this Court that the time is right to clarify *Cushing* and that "definitive clarification of the questions at issue" was frustrated when, after this Court granted certiorari for the second time in *Cushing*, 364 U.S. 878, the case was settled. Petitioners have omitted to mention, however, that, following a full trial on the merits and an appeal to the United States Court of Appeals for the Fifth Circuit, limitation was *granted*. With limitation denied in the case at bar, however, *Cushing* was moot and the only question to be answered was whether the Louisiana Direct Action Statute[3] was applicable to a policy of ocean marine insurance containing a collision liability clause. This question was answered in the affirmative and is in conformity with sound existing precedent, both Federal, *Cushing vs. Maryland Casualty Co.*, (5 Cir.,

---

[2]*Tokio Marine & Fire Ins. Co. vs. Aetna Cas. & Surety Co.*, (5 Cir., 1963) 322 F. 2d 113.

[3]Louisiana Revised Statutes, Title 22 §655.

1952) 198 F. 2d 536; *Lovless vs. Employers Liability Assurance Corporation* (5 Cir., 1955) 216 F. 2d 714; *Tokio Marine and Fire Ins. Co. vs. Aetna Cas. & Surety Co.* (5 Cir., 1963) 322 F. 2d 113; and State, *Reid vs. Crain Brothers* (La. App., 1961) 134 So. 2d 917.

Turning next to the second question posed by petitioners, it is clear that the decision of the United States Court of Appeal for the Fifth Circuit is in no way in conflict with the decisions of other circuits, particularly the decisions of the Second Circuit referred to by petitioners. It is submitted that the United States Court of Appeals for the Fifth Circuit has done nothing more in the instant case than to apply well established principles of maritime law relative to the requirements of seaworthiness to the facts as determined by the District Court. The cases alleged to be in conflict with the decision of the Appellate Court here hold nothing more than that the obligation of seaworthiness requires "reasonable fitness' and does not obligate a shipowner to furnish an "accident-free" vessel. "Reasonable fitness", however, is a relative matter depending upon the facts and circumstances of each case. On the facts presented in the case at bar, it has been determined that the CLARIBEL was not reasonably fit for her intended service.

As pointed out in the case of *Walker vs. Harris* (5 Cir., 1964) 335 F. 2d 185, cert. den. 379 U.S. 930:

> Seaworthiness, as that term has been defined and redefined, is reasonable fitness to perform or do the work at hand. *Saunders vs. Pool Shipping Co.*, 5 Cir., 1956, 235 F. 2d 729, 1956 AMC 1351; *Ionion Steamship Co. vs. United Distillers of America, Inc.*, 5 Cir., 1956, 236

> F. 2d 78, 1956 AMC 1750; *Tropical Marine Products vs. Birmingham Fire Ins. Co.*, 5 Cir., 1957, 247 F. 2d 116, 1957 AMC 1946; *Vega vs. The Malula*, 5 Cir., 1961, 291 F. 2d 415, 1961 AMC 1698; *Delta Eng'r vs. Scott*, 5 Cir., 1963, 322 F. 2d 11; *Texas Menhaden Co. vs. Johnson*, 5 Cir., 1964, ... F. 2d . . . . , ... , nn. 1, 2 [No. 20713, May 13, 1964]. The subsidiary questions leading to ultimate conclusion of seaworthiness are therefore: what is the vessel to do? What are the hazards, the perils, the forces likely to be incurred? Is the vessel or the particular fitting under scrutiny, sufficient to withstand those anticipated forces?"

All of these questions were answered by the evidence elicited at the trial and, it was determined, under the existing facts and circumstances, that the CLARIBEL, due to deficiencies in equipment and crew, was not reasonably fit for the service in which she was engaged; was, therefore, unseaworthy and the owners privy to such unseaworthiness. Petitioners have utterly failed to show that such factual determinations were "clearly erroneous."[4] With respect to the facts and circumstances found to exist in the case and which bore on propriety of the CLARIBEL's equipment and the competency of her crew, and, therefore, on the issue of her seaworthiness, the Appellate Court pointed out that:

> "Lake Pontchartrain is large and shallow, subject to sudden weather changes, treacherous squalls, and frequent fog. Commercial traffic

---

[4] *McAllister vs. United States*, supra.
The Court of Appeals here even commented that:
"The evidence generously supports the district court's finding that shortcomings of crew and compass were a proximate cause of the accident, though not the sole proximate cause."

> is heavy, and the barges that ply the lake are big and unwieldy. Petitioner's own compass expert, Mr. Irwin Williams, testified that anyone who navigates on Lake Pontchartrain should have a 'proper compass' and should understand how to use it. Libellants' expert, Captain E. R. Vorenkamp, said that, in his opinion, people operating tugs on the lake should have more or less the qualifications required of offshore navigators, and should certainly know how to check a compass for changes in deviation. In light of this testimony, we cannot say that the district court's finding of unseaworthiness is unwarranted, despite the laxity of prevailing custom on Lake Pontchartrain. Usage is not, and should not be, an inevitable standard." 341 F. 2d 956, 959.

Accordingly, no extraordinary test of seaworthiness has been announced or applied in the decision of the Court of Appeals for the Fifth Circuit, nor in the other decisions of that Court cited by petitioners. Its decisions are clearly in conformity with those of other circuits and properly state well established principles of maritime law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that there is no justification for the issuance of a *writ of certiorari* in this case and that the petition therefor should be denied.

GEORGE B. MATTHEWS
CHARLES E. LUGENBUHL
N. B. BARKLEY, JR.
WILLIAM McM. KING
Attorneys for Respondent,
The Greater New Orleans
Expressway Commission

Of Counsel:

LEMLE & KELLEHER
LANCASTER & KING
Of Counsel:
October, 1965

CERTIFICATE OF SERVICE

I, George B. Matthews, having been admitted to practice before this Honorable Court on the 18th day of April, 1960, do hereby certify that copies of the above and foregoing brief in opposition to the petition for certiorari have been served upon the petitioners by mailing the same to Eberhard P. Deutsch, Esq., c/o Deutsch, Kerrigan & Stiles, Attorneys at Law, Hibernia Bank Building, 812 Gravier Street, New Orleans, Louisiana, 70112, first class, postage prepaid, at New Orleans, Louisiana, this day of the month of , 1965.

George B. Matthews
1836 National Bank of
Commerce Building
New Orleans, Louisiana